No. 94

Office Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1961

BROTHERHOOD OF LOCOMOTIVE ENGINEERS;
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN;
ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN;
BROTHERHOOD OF RAILROAD TRAINMEN;
H. J. ROADCUP, Individually, and as General Chairman * * * of the Brotherhood of Locomotive Engineers * * *;
JAKE PASCHALL, Individually, and as General Chairman * * * of the Brotherhood of Locomotive Firemen and Enginemen * * *;
L. G. MULINIX, Individually, and as General Chairman * * * of the Order of Railway Conductors and Brakemen * * *;
J. M. KING, Individually, and as General Chairman * * * of the Brotherhood of Railroad Trainmen * * *, - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - - Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14486

Louisville and Nashville Railroad Company, - - - Plaintiff-Appellee,

v.

Brotherhood of Locomotive Engineers, Et Al, - - - Defendants-Appellants.

ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND JUDGMENT GRANTING INJUNCTION OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

Order.

This action is submitted on the record and the briefs of the parties have been considered.

The case of The Denver and Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, et al., No. 6796, decided July 27, 1960, by the United States District Court for the District of Colorado, and the authorities cited in that opinion by Judge Chilson require that the preliminary injunction granted in this action be made permanent.

It Is Therefore Ordered that counsel for plaintiff, Louisville and Nashville Railroad Company, submit detailed findings of fact and conclusions of law and tender judgment, December 20, 1960.

Henry L. Brooks,
United States District Judge.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

This cause coming on for a further and final hearing and the Court, having considered all pleadings, oral testimony, affidavits, exhibits, and the briefs and arguments of counsel, finds the facts and renders conclusions of law as follows:

FINDINGS OF FACTS.

1. The plaintiff (herein referred to as L&N or carrier) is a corporation organized and existing under the laws of Kentucky, and is a common carrier by railroad subject to the Railway Labor Act (45 U.S.C. Sec. 151, et seq.)

2. The defendants Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen (herein referred to as BLF&E, BLE, ORC&B and BRT, respectively, or as the labor organizations) are unincorporated labor organizations within the meaning of the Railway Labor Act. The BLF&E is the collective bargaining representative for firemen and hostlers employed by plaintiff; the BLE is the collective bargaining representative for engineers employed by the plaintiff; the ORC&B is the collective bargaining representative for plaintiff's conductors and brakemen; and the BRT is the collective bargaining representative for trainmen employed by the plaintiff.

3. The defendants Jake Paschall, H. J. Roadcup, L. G. Mullinix and J. M. King are the General Chairmen, throughout the property of the plaintiff, of the BLF&E, BLE, ORC&B and the BRT, respectively. All of the employees of the plaintiff represented by the four labor organizations are defendants herein and are too numerous to name. The defendants Jake Paschall, H. J. Roadcup, L. G. Mullinix

and J. M. King fairly and adequately represent herein all persons employed by the plaintiff as firemen and hostlers, engineers, conductors and brakemen, and trainmen, respectively.

4. By this action the plaintiff seeks a permanent injunction against a strike threatened by the four labor organizations to enforce a money award of the First Division, National Railroad Adjustment Board (herein referred to as Adjustment Board or Board) in a case involving Fireman B. G. Humphries.

5. This proceeding is the result of an actual case involving a dispute between the L&N and the BLF&E over the discharge of Fireman Humphries, a member of the BLF&E. Fireman Humphries was discharged from the service of the L&N on March 31, 1956, after a hearing on a charge of assaulting, on February 15, 1956, while he was off duty, two other employees of the L&N who were on duty and on the property of the carrier.

6. On April 11, 1956, the General Chairman of the BLF&E, on behalf of Fireman Humphries, formally protested the dismissal in a letter to the Director of Personnel of the L&N and demanded that Humphries be restored to service with former seniority unimpaired and paid for time lost. This grievance was discussed between representatives of the BLF&E and the L&N during several conferences, the last of the conferences at this stage being held on or about June 7, 1957. The L&N refused to reinstate Humphries. During these conferences no discussion was had as to whether Mr. Humphries had earnings in outside employment or whether, if so, such earnings were to be considered in arriving at the amount of back pay that would be due the claimant should he be reinstated to service. Because the L&N would not accede to the demands to reinstate Humphries, the BLF&E threatened to call a strike.

Findings of Facts and Conclusions of Law

7. On June 13, 1957, the L&N submitted the claim of Fireman Humphries to the Adjustment Board for its decision. The claim was submitted by the L&N to the Adjustment Board in the exact language as the claim had been submitted to the L&N by the General Chairman of the BLF&E. The claim, in both instances, was stated as follows:

> "Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to serve with former seniority unimpaired and paid for all time lost. Article 31."

8. The regular members of the Adjustment Board could not agree as to whether this claim of Fireman Humphries should be denied or sustained and a referee was assigned to break the deadlock. On May 14, 1958, the Adjustment Board, with the referee sitting as a member, issued its Award 18720 which held:

> "Claim sustained with pay for time lost as the rule is construed on the property."

On the same day, an order was entered by the Adjustment Board directing that its Award 18720 be complied with on or before June 14, 1958.

9. The evidence shows without contradiction that the rule referred to in Award 18720 is a part of Article 31 of the agreement between the L&N and the employees represented by the BLF&E, the specific section of the rule being Article 31(f) which provides as follows:

> "If the discipline administered is not sustained, it will be cancelled and the firemen in question will be paid for any time lost by him resulting from the investigation or action taken.

"Note: This section applies only where a fireman is held out of service on account of his responsibility, and does not refer to loss of time on account of being held off of his run to attend investigation."

10. On May 17, 1958, the Director of Personnel of the L&N ordered that Fireman Humphries be restored to the service. On the same date the L&N, following a procedure it had followed in the past in such instances to obtain information for the purpose of deducting outside earnings, requesfed that Fireman Humphries furnish the carrier with a statement of his earnings in other employement, if any, while out of L&N service. The General Chairman of the BLF&E was advised of this request by the L&N on the same date.

It has been the consistent position of the defendants that outside earnings shall not be deducted, and it has been the consistent position of the plaintiff that outside earnings shall be deducted.

11. Fireman Humphries has failed and refused to furnish the L&N with any statement concerning his earnings in other employment while out of L&N service. The General Chairman of BLF&E, on May 20, 1958, advised the L&N's Director of Personnel that Award 18720 and Article 31(f) of the agreement did not authorize any deduction for earnings in outside employment and demanded that the L&N pay to Fireman Humphries the full amount he would have earned with the L&N without any deduction for earnings in outside employment.

12. On June 26, 1958, the Director of Personnel of L&N advised the General Chairman of the BLF&E, in part, as follows:

"We have secured from our Accounting Department necessary data for determining what Mr. Hum-

phries would have earned as fireman between March 31, 1956 and May 29, 1958, had he not been discharged, and are ready to discuss with you the money payment due him under Award 18720. But we certainly cannot agree with you that his outside earnings during the time he was out of L&N service should not be deducted.

. . . . . .

"Fireman Humphries has declined to furnish statement of his outside earnings. If and when this is done, we are ready to make whatever money payment may be due him under Award 18720."

13. During July, 1958, conferences were held on the property of the L&N concerning the dispute as to the meaning and proper application of Award 18720. The General Chairman of the BLF&E invited the General Chairmen of the BLE, ORC&B and the BRT to attend these conferences.

Fireman Humphries is a member of the craft or class known on the railroad as "firemen" and he is a member of the BLF&E. His claim for reinstatement and back pay was submitted to the L&N by the BLF&E. The BLF&E alone represented Fireman Humphries before the Adjustment Board where the dispute involved only the provisions of the agreement between the L&N and the employees represented by the BLF&E. The BLF&E was the only labor organization that was a party to the dispute before the Adjustment Board in the case involving Award 18720.

Representatives of the BLE, ORC&B and the BRT were invited to attend the July, 1958 conferences by the General Chairman of the BLF&E, pursuant to "an agreement of the four Brotherhoods to cooperate in all complaints in respect to the application of awards by the First Division of the National Railroad Adjustment Board."

During these conferences the representatives of the four labor organizations urged representatives of the L&N to ignore any outside earnings Fireman Humphries may have had in applying Award 18720. The L&N representatives contended that, since the BLF&E and the L&N could not agree concerning the proper application of Award 18720 the matter should be referred to the Board for an interpretation pursuant to Section 3 First (m) of the Railway Labor Act. Such a proceeding had been followed by the carrier in a similar dispute between BRT and the Terminal Railroad Association of St. Louis in Award 11825, First Division of the Board. The BLF&E was unwilling to seek or join the L&N in seeking an interpretation of Award 18720 from the Board, and contended there was no bona fide dispute as to the meaning of the award. At the conclusion of the conference on July 30, 1958, the L&N was requested to furnish a written statement concerning its position in applying Award 18720.

14. This request was complied with by the L&N by a letter dated August 9, 1958, from the carrier's Director of Personnel to the General Chairman of the BLF&E. This letter read, in part:

> "This letter has further reference to the case of Fireman B. G. Humphries who was restored to the service in June of this year in compliance with First Division Award 18720. It is being written at your request to confirm the several conferences we have had, the last one on July 30th, concerning our disagreement over the proper application of that part of the Award reading 'with pay for time lost as the rule is construed on the property'.
>
> . . . . . .
>
> "We have complied with that part of Award 18720 with respect to restoring Fireman Humphries to the

service. We stand ready to comply with the balance of the Award, which we interpret to permit deduction of outside earnings, as soon as Fireman Humphries furnishes the requested statement showing this information so that the amount due him under the Award may be determined."

15. During August, 1958, the representatives of the labor organizations commenced taking preliminary steps in order to call a strike for the purpose of compelling the L&N to comply with Award 18720 without any deduction of outside earnings.

16. On September 28, 1958, the L&N filed with the Board an ex parte "Request for Interpretation" of Award 18720, in which it was alleged that a dispute existed between the parties involving the proper application of the award in connection with determining the amount due the claimant for time lost. This "Request for Interpretation" set forth the nature of the dispute and requested the Board to clarify its Award 18720 with respect to pay for time lost.

17. The Executive Secretary of the Adjustment Board, by letter dated October 9, 1958, requested the General Chairman of the BLF&E to advise whether or not a dispute existed as to the meaning of Award 18720. The General Chairman, by letter dated November 14, 1958, opposed the carrier's "Request for Interpretation" and advised the Executive Secretary of the Board that, prior to the carrier's original submission, no issue had been raised on the property concerning outside earnings, that the carrier had not requested an Award permitting deduction of outside earnings, and that the petition for interpretation was, in fact, a presentation of a new case and a dispute not before the Board at the time it rendered Award 18726. This letter was concluded with the following paragraph:

Findings of Facts and Conclusions of Law

"This will advise you that there is no dispute on the part of the Brotherhood of Firemen and Enginemen as to the meaning or intent of Award 18720 and the carrier is simply attempting to have the Award changed in the guise of an interpretation."

18. On December 17, 1958, a divided Board with the referee sitting to break the deadlock, adopted the contentions advanced by the BLF&E and held as follows:

"The above numbered award sustained a claim for reinstatement of claimant to service with pay for time lost as the rule is construed on the property.

"In its request for interpretation carrier asserts that a dispute exists between the parties as to the proper application of the award in that carrier asserts and the organization denies that outside earnings during the period held out of service should be deducted in computing pay for time lost. Wherefore carrier seeks to have the Division determine that dispute as an interpretation of its award.

"Facts and supporting data as to that issue were not included in the docket on which Award 18720 was predicated, the issue here raised was not submitted to the Division for determination, and we may not now determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17500 and 'Interpretation' thereof."

19. A further conference was held on the property of the L&N on January 23, 1959, between representatives of the L&N and the four labor organizations. Representatives of the labor organizations again demanded that Fireman Humphries be paid wages without any deduction of outside earnings and advised that a strike date would be

set if this were not done. L&N representatives declined to so apply the award and suggested that the controversy be resolved by submitting it to the Board as a new dispute.

20. On January 23, 1959, representatives of the L&N submitted the controversy ex parte to the Adjustment Board as a new dispute for its decision.

21. The General Chairmen of the four labor organizations, on February 10, 1959, sent the following telegram to the Director of Personnel of the L&N:

"TELEGRAM

Louisville, Ky. Feb. 10, 1959.

"W S Scholl Director Of Personnel Louisville & Nashville Railroad 908 West Broadway Lville

This Will Advise Employees Represented By BLE BLF&E ORC&B And BRT Will Withdraw From Carrier's Service At 12:00 Noon Friday February 13, 1959 In A Joint Legal Strike Approved And Authorized By The Brotherhood's Chief Executives Due To Carrier's Adamant Insistance That Outside Earnings Of Fireman Humphries Must Be Deducted From Any Money Due Him Under Award 18720

H J Roadcup Jake Paschall L G Mulinix J M King"

On the same date, February 10, 1959, the Director of Personnel received the following telegram from the Executive Secretary of the National Mediation Board, Washington, D. C.:

"TELEGRAM

Washington, D. C., Feb. 10, 1959

"W. S. Scholl, Dir Pers.

Louisville & Nashville Railroad Co. Lville

Findings of Facts and Conclusions of Law

Following Wire Received From Messrs Brown, Gilbert, Paddock And Kennedy 'Strike Of Employes Represented By BLE, BLF&E, ORC&B And BRT On The Louisville And Nashville (Proper) Set For Twelve Noon Friday February 13, 1959 Account Refusal Of Carrier To Apply Award 18720 First Division NRAB. Please Accept This Telegram As Seventy-Two Hour Notice In Cases Of This Kind.' Please Wire Statement

E. C. Thompson Exect Secy NMB"

22. The L&N instituted this proceeding on February 12, 1959 and sought a temporary restraining order and a preliminary injunction, to be made permanent on final hearing, to restrain and enjoin the threatened strike. A temporary restraining order was issued on February 12, 1959, and a hearing was set for February 18, 1959, on the question of the issuance of a preliminary injunction. By agreement of all the parties, an order was entered on February 17, 1959, continuing the temporary restraining order in effect as a preliminary injunction until the action was determined by the Court on the merits. The case was assigned for trial on May 18, 1959.

23. The defendants then filed their joint answer, in which they allege that the Court is without jurisdiction to grant the injunctive relief. The joint answer also contains allegations that no bona fide dispute was pending before the Adjustment Board and that the carrier had acted in bad faith. The sole purpose of the strike by the four labor organizations is affirmatively alleged in their joint answer as a strike authorized for the "purpose of enforcing the award" and as a strike "called solely because of the plaintiff's refusal to comply with the plain provisions of an award entered by the National Railroad Adjustment Board."

Findings of Facts and Conclusions of Law

24. On April 30, 1959, the plaintiff filed a motion for judgment on the pleadings upon the ground that the joint answer of the defendants constituted an admission by the defendants that the threatened strike was called for the purpose of enforcing a money award of the National Railroad Adjustment Board, and that the threatened strike constituted a violation of the Railway Labor Act.

25. This cause came on for hearing on May 18, 1959, on the carrier's motion for judgment on the pleadings and for final trial. Disposition of the motion for judgment on the pleadings was passed by the Court until such time as all proof had been heard. Testimony of witnesses was heard by the Court on May 18, 1959. Upon the call of the case on May 19, 1959, counsel for all parties appeared and agreed that the taking of proof should be suspended and the case passed until January 4, 1960, and each of the parties agreed that "it would promptly use its best efforts to secure an advancement by the National Railroad Adjustment Board, First Division, of the presently pending submission involving the claim of B. G. Humphries, to the end that it may be disposed of by that Board on or before January 4, 1960." An order was entered by the Court in accordance with the agreement of the parties, and the case was passed until January 4, 1960.

26. On December 9, 1959, an equally divided Board with a referee sitting to break the deadlock, dismissed the L&N's submission of the controversy as a new dispute, holding that Award 18720 disposed of the claim of Fireman Humphries for reinstatement and back pay and that "the matter must be judged res judicata."

27. The defendants, on December 22, 1959, filed a motion to dissolve the "temporary injunction issued herein on February 12, 1959" on the ground that the carrier's sub-

mission before the Board had been disposed of and the Norris-LaGuardia Act prohibited "the continuance in force of the temporary injunction." On December 23, 1959, the plaintiff filed a motion for leave to file an amendment to the complaint, a copy of which was attached and served, "for the purpose of clarifying the allegations of the complaint." The amendment to the complaint contained detailed allegations in support of the carrier's contention that the strike for the purpose of enforcing Award 18720, a money award of the Adjustment Board, was a strike in violation of the Railway Labor Act. On May 31, 1960, the defendants filed their joint answer to the amendment to the complaint in which they denied all allegations except that they admitted that the threatened strike would cause the carrier irreparable injury. The amendment to the complaint was subsequently ordered filed.

28. By agreement of the parties, the Court entered an order permitting additional evidence to be introduced by affidavits. They are now completed and constitute a part of the record. On October 5, 1960, the parties concluded the filing of extensive briefs.

29. The ultimate issues now before the Court for decision are shown by these basic contentions of the parties:

(a) The L&N contends that the threatened strike is to enforce Award 18720 of the Board and that a strike to enforce this money award is repugnant to the Railway Labor Act and unlawful.

(b) The contentions of the labor organizations are basically two-fold:

(1) They deny that the threatened strike violates the Railway Labor Act and is unlawful and allege that the Norris-LaGuardia Act deprives the Court of jurisdiction and power to issue the requested injunction; and

Findings of Facts and Conclusions of Law

(2) They assert that the L&N has acted in bad faith in handling the Humphries claim and that no bona fide dispute exists as to the meaning of Award 18720 or Article 31(f) of the agreement, all in support of their contention that the Court, in the exercise of sound discretion, should refuse to grant equitable relief to the carrier in any event because it has "unclean hands".

30. A great deal of evidence has been introduced relative to the propriety of deducting outside earnings under Award 18720 or Article 31(f) of the agreement. The Court has considered all of this evidence to determine whether the L&N is guilty of bad faith or has "unclean hands" as charged by the defendants.

The Court, without purporting to make a finding as to whether or not outside earnings are properly deductible, does find that the L&N has exercised good faith and is not guilty of bad faith or of coming into Court with "unclean hands".

L&N was not required to accede to the unions' interpretation of Award 18720 and Article 31(f) of the agreement. When it became obvious that a disagreement existed as to the interpretation of that award, the L&N was justified in seeking to have it resolved by the National Railroad Adjustment Board. The evidence shows that the Adjustment Board had in the past made such interpretations of its awards and such procedure is provided for by the Railway Labor Act (45 U.S.C. Sec. 153, First (m)).

L&N has shown that its opinion of a right to deduct outside earnings was not a frivolous one nor "a wilful and perverse attempt to evade and violate the provisions of Article 31(f)" as contended by the defendants. The various opinions of the Adjustment Board, and the opinion of

the Kentucky Court of Appeals in the Wells case (L&N v. Wells, 289 Ky. 700, 160 S. W. 2d 16) justified L&N's opinion. The record further shows that in previous discipline cases involving the defendant organizations, L&N has sought advice as to whether or not there were outside earnings, and the present General Chairman of the BLF&E had notice that such advice was sought.

Among the Adjustment Board awards involving the deduction of outside earnings is Award 16408 of the First Division which, in part, reads:

> "Among union-management agreements, some explicitly authorize such deductions and a few prohibit them; but most are silent on the question, being content either not to mention compensation for lost time or merely to state in general that such compensation shall be paid, but without defining explicitly what is meant by 'compensation', 'lost time', or 'lost earnings'. We are of the opinion that, where an agreement is no explicit and where there is no controlling practice to the contrary on a property, a general rule mentioning compensation for lost time or earnings shall be interpreted so as to permit or authorize deduction for earnings in outside employment. This is because we incline to the view, supported in import by law and by a number of awards of this Division, that the primary purpose of providing such compensation is to make the wronged employe whole. We think such an employe is made whole when he receives an amount of compensation from his primary employer plus wage income from one or more 'outside' employers equal to the amount he would have earned if he had worked steadily with the primary employer in the absence of wrongful deprivation of such work."

The defendants have conceded in their brief that a Court of Law would probably allow the deduction of outside earnings to be made. It was not bad faith on the part of the L&N to take a position that, concededly, has generally been held by the courts to be legally justifiable.

The fact that L&N, in national rules cases, had served Section 6 notices relative to a desired rewording of Article 31(f) does not show bad faith on its part in taking the position it has. The reason for serving such notices is adequately explained in the evidence. The effect of those notices is not as contended by defendants as is further shown by National Railroad Adjustment Board Award 16408 of the First Division which, in part, reads:

> "It has been contended that, because the carriers sought from the railroad labor organizations a specific rule authorizing the deduction of outside earnings in such cases, the carriers have admitted that most present rules on the matter are to be interpreted as not allowing or authorizing such deductions. We are not persuaded that this conclusion is necessarily valid. In our opinion the most that can be inferred from this move by the carriers is that most of the present rules are so general as to be susceptible of various and conflicting interpretations."

31. In accordance with the stipulation of the parties, the Court further finds that the carrier would suffer irreparable injury in the event of the strike. The amount involved exceeds $10,000.00 exclusive of interest and costs.

32. The Court finds that no court enforcement proceeding of Award 18720 has been filed pursuant to the provisions of Section 3 First (p) of the Railway Labor Act. (45 U.S.C. Sec. 153 First (p)), and that the sole purpose of

the threatened strike is to enforce Award 18720, a money award of the First Division, National Railroad Adjustment Board. There is no dispute concerning this purpose of the threatened strike.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the subject matter of the action.

2. The Railway Labor Act, as interpreted by the Supreme Court, recognizes two separate classes of railway labor disputes referred to as "major" disputes and "minor" disputes. The first class relates to disputes over the formation of collective agreements and look to the acquisition of rights for the future. "Minor" disputes contemplate the existence of an agreement and are controversies as to rights accrued, usually involving only one employee. The dispute between the L&N and the BLF&E involving the claim of Fireman Humphries is a "minor" dispute. Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711; Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 U. S. 30.

3. By the enactment of the Railway Labor Act Congress has provided a complete statutory plan for the orderly and peaceful settlement of such "minor" disputes. Among the expressly stated purposes of the Act are: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein"; and ". . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Sec. 2 (45 U.S.C. Sec. 151a).

4. Section 3 First (m) of the Railway Labor Act (45 U.S.C. Sec. 153 First (m)) provides that the Adjustment Board's "awards shall be final and binding upon both

parties to the dispute, except insofar as they shall contain a money award." Award 18720 of the First Division, National Railroad Adjustment Board, is a "money award" which falls within the exception of Section 3 First (m) of the Act and does not constitute a "final and binding award."

5. Additional procedure for the orderly and peaceful settlement of "minor" disputes beyond the rendering of the Board's award are expressly provided for in the Act. In case of dispute involving an interpretation of the award either party may request the Division to interpret the award in the light of the dispute. Section 3 First (m). In case of an award favorable to a claimant, the Division shall make an order, directed to the carrier, to make the award effective and, if the payment of money is required, to pay such sum to the employee. Section 3 First (o). If the carrier does not comply with an order, enforcement may be sought in a suit by, as here, the BLF&E or Humphries, in a District Court of the United States as provided in Section 3 First (p) of the Act (45 U.S.C. Sec. 153 First (m), (o) and (p)).

6. The enforcement suit provided by Section 3 First (p) of the Act is an integral part of the entire statutory plan for the complete and final settlement of such a "minor" dispute as is involved here.

7. "The specifications of one remedy [in the Railway Labor Act] normally excludes another." Switchmen's Union of N. A. v. National Mediation Board, 320 U. S. 297; Union P. R. Co. v. Price, 360 U. S. 601.

8. The existence of the complete statutory scheme for the orderly and peaceful settlement of such "minor" disputes cannot realistically be squared with the contention that Congress did not propose to foreclose strikes, such as

the one involved here, called solely for the purpose of enforcing a money award of the National Railroad Adjustment Board. Denver & Rio Grande W. R. Co. v. Brotherhood of R. Trainmen, 185 F. Supp. 369 (D.C., Colo., 1960).

9. Congress having expressly provided a means of enforcement of the Board's award by the detailed provisions of Section 3 First (p) of the Railway Labor Act, the prescribed procedure excludes any other means of enforcement, including enforcement by strike. Denver & Rio Grande W. R. Co. v. Brotherhood of R. Trainmen, 185 F. Supp. 369 (D.C., Colo., 1960).

10. The purpose of the strike is to force the carrier to pay a "money award" without the defendant BLF&E's securing a judgment of a proper District Court of the United States under Section 3 First (p) of the Railway Labor Act. The BLF&E has failed to exhaust its remedies under the Railway Labor Act, and the threatened strike is in violation of that statute.

11. The Norris-LaGuardia Act (29 U.S.C. Sec. 101, et seq.) has not withdrawn the power of federal courts to issue injunctions in labor disputes in all instances. The "Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 U. S. 30.

12. In this instance the specific provisions of the Railway Labor Act takes precedence over the earlier and more general provisions of the Norris-LaGuardia Act. The Court has jurisdiction and power to issue necessary injunctive orders to vindicate the processes of the Railway Labor Act. Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 U. S. 30.

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13. This Court has jurisdiction and power, notwithstanding the provisions of the Norris-LaGuardia Act, to issue a decree enjoining the threatened strike called for the express purpose of enforcing Award 18720, a money award of the First Division, National Railroad Adjustment Board. Denver & Rio Grande W. R. Co. v. Brotherhood of R. Trainmen, 185 F. Supp. 369, and cases cited therein.

14. The BLF&E, the authorized representative of Fireman Humphries and a party to the Board proceeding in Award 18720, cannot lawfully strike to enforce this money award of the Adjustment Board. The Court concludes that the BLE, ORC&B and the BRT, none of which represent Fireman Humphries and none of which were parties to any of the proceedings before the Board, cannot lawfully strike to enforce Award 18720, notwithstanding the provisions of any agreement that may exist among the four labor organizations to the contrary.

15. Since the evidence does not support any finding that the carrier has acted in bad faith or has "unclean hands", this affirmative defense must be denied.

16. The carrier has exhausted all available remedies and has no adequate remedy at law.

17. The Court concludes:

(a) The motion of the L&N for judgment on the pleadings should be overruled since the Court has considered the case on the merits.

(b) The defendants' motion to dissolve the "temporary injunction" should be denied.

(c) The plaintiff's prayer for a permanent injunction should be granted, and a permanent injunction should issue.

(s) Henry L. Brooks,
United States District Judge.

January 18, 1961.

JUDGMENT GRANTING INJUNCTION—Tendered January 11, 1961.

This cause having been submitted upon the Transcript of the Evidence and the affidavits submitted by the parties, and after oral argument and briefs having been filed by counsel after this matter came on for hearing and the Court having considered the evidence introduced by the parties, and the arguments of counsel, and being fully advised in the premises the Court finds:

1. That the defendant, Brotherhood of Locomotive Firemen and Enginemen has threatened to strike and intends to strike against the plaintiffs, solely because of or on account of plaintiff's refusal to accept or noncompliance with Award Number 18720, docket number 34752 entitled Louisville & Nashville Railroad Company v. Brotherhood of Locomotive Firemen and Enginemen concerning the claim of firemen B. G. Humphries, entered on May 14, 1958, by the First Division of the National Railroad Adjustment Board, and the order thereon, and without instituting and proceeding to judgment an enforcement proceeding in the United States District Court as authorized and provided for in the Railway Labor Act Title 45 U.S.C.A. Section 151, et seq. The other defendants, Brotherhood of Locomotive Engineers, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, intend to assist said defendant, Brotherhood of Locomotive Firemen and Enginemen, in said strike and themselves to strike in sympathy with said defendant. Said strike, if it occurs, would cause immediate and irreparable injury, loss and damage to the plaintiffs in that the strike of the plaintiff's employees as threatened will shut down the operations of the plaintiff's railroad and cause cessation of the movement of freight and passengers on plaintiff's line and in interstate

commerce, and will cause the plaintiff to lose a large sum daily in revenue from passengers and freight, and will cause the plaintiff to incur fixed charges in a large amount daily without any revenue. Plaintiff has no adequate remedy at law, and the amount involved exceeds Ten Thousand Dollars ($10,000) exclusive of interest and costs.

2. The Court concludes:

A. That it has jurisdiction of the subject matter and the parties to this action for the purpose of granting a permanent injunction;

B. That the permanent injunction ought to issue as prayed for in the complaint.

It is, therefore, ordered, adjudged and decreed, that the defendants, Brotherhood of Locomotive Firemen and Enginemen and Jake Paschall as General Chairman and individually; Brotherhood of Locomotive Engineers and H. J. Roadcup as General Chairman and individually; Order of Railway Conductors and Brakemen and L. G. Mulinix as General Chairman and individually; Brotherhood of Railroad Trainmen and J. M. King as General Chairman and individually; the members of the crafts and classes they represent, and all persons in active concert or participating with them be, and they hereby are enjoined;

(a) From carrying out the threat of strike or striking against the plaintiff, solely because or on account of the plaintiff's refusal to accept or noncompliance with the aforesaid Award Number 18720 and order of the National Railroad Adjustment Board, First Division.

(b) From, for the purpose set out in (a), in any manner impeding, obstructing, hampering or interfering with the business of the plaintiff.

(c) From, for the purpose set out in (a), preventing or attempting to prevent by any species of intimidation, threats, force or coercion, any of the plaintiff's officers,

agents, employees, representatives, and others having business with the plaintiff from entering, leaving, and transacting business on its premises;

(d) From, for the purpose set out in (a), picketing the properties of the plaintiff and from interfering with ingress or egress from its premises, including delivery, unloading, and dispatching of its rolling stock and other equipment, in, on, about and between the plants and premises of its customers, or from loitering or congregating at or near any approaches thereto or upon any public street or highway leading into or from any place the employees of the plaintiff desire to enter or leave enroute from or to said premises;

(e) From, for the purposes set forth in (a), ordering, inducing, attempting to induce, condemning, participating in, assisting or permitting any strike, slowdown, stoppage of work or interruption of the operation of the plaintiff's railroad.

And it is further ordered that the Brotherhood of Locomotive Firemen and Enginemen and Jake Paschall, as General Chairman and individually; Brotherhood of Locomotive Engineers and H. J. Roadcup, as General Chairman and individually; Order of Railway Conductors and Brakemen and L. G. Mulinix as General Chairman and individually; Brotherhood of Railroad Trainmen and J. M. King as General Chairman and individually; and their appropriate officers, agents, servants and employees are directed forthwith to instruct and to take all action as may be necessary to insure that such instructions are carried out, and all plaintiff's employees represented by them continue their normal employment and in not ceasing employment for the purposes set out in (a).

It is further ordered that the defendant's motion to dissolve the temporary injunction is hereby overruled.

It is further ordered that since the Court has considered this matter on the merits and the findings of facts and conclusions of law the plaintiff's motion for judgment on the pleadings is overruled.

It is further ordered that since said temporary injunction has now been made permanent that the Louisville & Nashville Railroad Company, as principal, and the Fidelity & Deposit Company of Maryland, as surety, upon its bond filed in this action in the amount of Fifty Thousand Dollars ($50,000) dated February 12, 1959, are hereby discharged, and the premium for said bond shall be taxed as an item of cost against the defendants.

It is further ordered and adjudged that the plaintiff is awarded its costs in this action.

Issued at Louisville, Kentucky, this 18 day of January, 1961, at 9:30 o'clock A. M.

(s) Henry L. Brooks,
United States District Judge.

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Opinion.

Decided December 18, 1961.

Before Martin and Cecil, Circuit Judges; Darr, District Judge.

Per Curiam. This is an appeal by the Brotherhood of Locomotive Engineers, the other three Railroad Brotherhoods, and certain individuals, from an injunction against the Brotherhoods enjoining them from carrying out the threat of a strike against the carrier, solely because of the carrier's refusal to comply with an order of the National Railroad Adjustment Board to enforce a money award in favor of a railroad employee. In its award, the Adjust-

ment Board stated as to the award: "Claim sustained with pay for time lost as the rule is construed on the property." The dispute between the Brotherhoods and the Railroad was as to whether or not the employee was entitled to his wages lost while he was laid off by the carrier without deducting his outside earnings during such period.

When the carrier applied to the Board for an interpretation of its decision, the Board was evenly divided, necessitating the decision of an appointed Referee to break the deadlock. The decision of the Referee adopted the contention advanced by the Brotherhood of Locomotive Firemen and Enginemen, as follows: "The above numbered award sustained a claim for reinstatement of claimant to service with pay for time lost as the rule is construed on the property.

"In its request for interpretation carrier asserts that a dispute exists between the parties as to the proper application of the award in that carrier asserts and the organization denies that outside earnings during the period held out of service should be deducted in computing pay for time lost. Wherefore carrier seeks to have the Division determine that dispute as an interpretation of its award.

"Facts and supporting data as to that issue were not included in the docket on which Award 18720 was predicated, the issue here raised was not submitted to the Division for determination, and we may not determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17500 and 'interpretation' thereof."

The carrier ultimately felt forced to file an injunction suit against a strike by the Brotherhoods over this controversial issue.

We find no merit in appellants' argument that the record reveals that appellee comes into court with unclean

hands. Moreover, the dispute between the laid-off fireman, Humphries, and his Brotherhood on the one hand, and the Railroad on the other, involving his claim, is a "minor dispute." In such instance, we think the United States Courts have jurisdiction and power to issue necessary injunctive orders to vindicate the processes of the Railway Labor Act. See *Brotherhood of Railroad Trainmen* v. *Chicago River and I. R. Co.*, 353 U. S. 30.

District Judge Brooks filed comprehensive findings of fact, all supported by substantial evidence and not clearly erroneous, and well-reasoned conclusions of law, in which this court concurs.

Accordingly, the judgment of the United States District Court is affirmed.

JUDGMENT.

December 18, 1961.

Appeal from the United States District Court for the Western District of Kentucky.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) John D. Martin,
United States Circuit Judge.

PETITION FOR REHEARING, AND FOR CLARIFICATION AND EXTENSION OF THE OPINION AND ORDER DENYING SAME.

Petition for Rehearing, Etc.

This document is not filed with either the hope or the expectation that this Court will recede from its order affirming the judgment of the lower court.

However, the Opinion of this Court leaves defendants-appellants and their counsel completely in the dark as to whether or not this Court intended to decide this case on the ground that the National Railway Labor Act precludes all strikes in respect of minor labor disputes irrespective of whether the strike is for the purpose of bringing economic pressure upon the railroad to recede from its refusal to comply with an order of the Railroad Adjustment Board in favor of the employee, or for some other purpose; and whether or not by its Opinion, this Court intended to also hold that the Railway Labor Act makes the enforcement suit provided for by Section 3, First (p) of the Railway Labor Act (45 U.S.C.A., Section 153, First (p)) the exclusive remedy and the only recourse available to an employee and his union when the railroad refuses to comply with an award in favor of the employee; in other words, whether the enforcement suit provided for by the Act precludes a strike to enforce an award by the Railroad Adjustment Board.

We suggest that the Brotherhoods are entitled to a specific decision of this Court on those questions, as they were the sole grounds on which the Railroad justified the injunction of the lower court.

The Brotherhoods contemplate an application to the Supreme Court for a writ of certiorari to review the action of this Court in the above entitled case. Therefore, certainly, this Court should make it clear whether it intended

to hold that the provisions of the National Railway Labor Act outlaws all strikes in minor labor disputes between the railroad and its employees, and, also, whether it was intended to hold that the enforcement suit provided by Section 3, First (p) of the Railway Labor Act precludes a strike to enforce such an award.

We do not feel that the per curiam Opinion's adoption of the conclusions of law of the lower court satisfies the situation here presented. To begin with, it was rather startling to read in the Opinion this language:

> "District Judge Brooks filed *comprehensive findings of fact, all supported by substantial evidence and not clearly erroneous, and well-reasoned conclusions of law, in which this court concurs.*" (Emphasis added.)

The opinion of the lower court entitled "Order" will be found at page 98a of the Appendix to the Brief of Defendants-Appellants and reads as follows:

> "This action is submitted on the record and the briefs of the parties have been considered.
>
> "The case of The Denver and Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, et al., No. 6796, decided July 27, 1960, by the United States District Court for the District of Colorado, and the authorities cited in that opinion by Judge Chilson required that the preliminary injunction granted in this action be made permanent.
>
> "It Is Therefore Ordered that counsel for plaintiff, Louisville and Nashville Railroad Company, submit detailed findings of fact and conclusions of law and tender judgment. December 20, 1960."

It will be observed that the district judge's opinion did no more than announce his conclusion that he had jurisdiction to enjoin the threatened strike. That so-called "order" gave no clue whatever as to what the district judge considered the proven facts to be, nor did it contain any discussion whatever of the Railway Labor Act or of any legal principle applicable thereto. In effect, it ordered and authorized counsel for the Railroad to submit findings of fact gathered from the record and conclusions of law which counsel thought would support the ultimate conclusions of the court, and that is exactly what was done. Counsel for the Railroad merely submitted the substance of their arguments and briefs. When those findings of fact and conclusions of law were submitted to the district judge, he accepted same with scarcely the dotting of an "i" or the crossing of a "t". In view of those facts, it is incongruous for this Court to refer to the conclusions of law of the lower court as "well-reasoned conclusions of law."

We think this Court fully appreciates that under Supreme Court Rule No. 19, a review of this Court's action very likely will depend upon whether or not this Court

(1) "has decided an important question of federal law which has not been, but should be, settled by this court";

or

(2) "has decided a federal question in a way in conflict with applicable decisions of this court."

Our feeling is that the Opinion of this Court meets both of those tests, but it does not say so. If this Court intended to decide that all strikes in respect of minor labor disputes in the railroad industry are prohibited by the Railway Labor Act, then, we believe that conclusion falls

under (2) above in that the conclusion would be in conflict with the applicable decisions of the Supreme Court on the subject. If this Court intended to decide that the enforcement suit provided by the Act precludes strikes in respect of an award with which the railroad refuses to comply, then, that conclusion is on an important feature of the Railway Labor Act which has not been, but should be, settled by the Supreme Court, and falls within (1) above.

When the Brotherhoods make application for writ of certiorari, they should not be required to speculate about what the court decided on those two questions, nor should we be required to ask the Supreme Court to speculate on just what the Opinion of this Court means. Surely, this Court will not be willing to leave the Brotherhoods in such a dilemma. The Opinion should be so clear on the two points above referred to that it will need no interpretation when application is made for writ of certiorari.

Premises considered, the Court is respectfully asked:

(1) to grant a rehearing;

(2) on such rehearing, to set out—if such be the fact—that the Court intended to decide either

(a) that the Railway Labor Act, prohibits all strikes in minor labor disputes, or

(b) that under the statute the enforcement suit provided thereby precludes a strike to enforce an award made by the Railroad Adjustment Board to an employee, or

(c) that it was intended to decide both of those questions in favor of the Railroad.

ORDER.

Before Martin and Cecil, Circuit Judges; and Darr, District Judge.

The petition for rehearing, and for clarification and extension of the opinion, filed by the Defendants-Appellants, is denied.

ENTER:

(s) John D. Martin,
United States Circuit Judge.

STATUTES INVOLVED.

Railway Labor Act.

Section 3, First (i) through (p) (45 U.S.C. Section 153, First (i) through (p)):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall

give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding

upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses

of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Norris-LaGuardia Act

29 U.S.C. Sections 101, 104, 113:

Section 101. "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

Section 104. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

* * * * *

Section 113. "When used in this chapter, and for the purposes of this chapter—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more

employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

EXTRACTS FROM CONTRACTS (RULES) BETWEEN THE RAILROAD COMPANY AND PETITIONING UNIONS.

Applicable Portion of Article 31 of the Contract Between The Railroad Company and Petitioner, Brotherhood of Locomotive Firemen and Enginemen.

"(a) Firemen will not be demerited, discharged or otherwise disciplined without good cause.

"(b) When it appears necessary to discipline a fireman by demerit or discharge, he will be notified in writing of the cause therefor, within 10 days after knowledge of such cause comes to the officer or officers of the railroad having authority in such case, and within 10 days after the notification there will be an investigation conducted by the proper officer or officers of the railroad, at which all evidence in the case will be submitted. The fireman so notified will be permitted to attend the investigation; to have such witnesses as he may desire to testify; to hear all evidence and to be represented by the Chairman of the Local Committee of his organization and/or by fellow employees of his own selection.

"(c) A proper record of the case will be made and certified to on the part of the railroad and on the part of the fireman subject to discipline in connection therewith, and the record will be made the basis for administering discipline, or of appeal to a higher officer.

"(d) Within 10 days after the close of the investigation unless further time is mutually agreed upon, the proper officer will notify the party in question of the decision and action. If the decision is unsatisfactory, the party in question has the right to appeal to the Director of Personnel, except that in cases pertaining exclusively to mechanical

matters, the appeal will be made through the Superintendent of Machinery.

"(e) When a fireman has been disciplined and desires to appeal, he or his representative will, upon application, be furnished with a copy of all statements taken at the investigation.

"(f) If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken."

Article 31(f) of the Contract Between The Railroad Company and Petitioner, Brotherhood of Locomotive Engineers.

"If the discipline administered is not sustained, it will be canceled, and the party in question will be paid for any time lost by him resulting from the investigation or action taken."

Applicable Portion of Article 31 of the Contract Between The Railroad Company and Petitioner, Brotherhood of Railroad Trainmen.

"In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and paid full wages for any time he may have lost as a result of the charge or investigation."

Applicable Portion of Article 31 of the Contract Between The Railroad Company and Petitioner, Order of Railway Conductors and Brakemen.

"In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and paid full wages for any time he may have lost as a result of the charge or investigation."

OPINIONS AND ORDERS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION, IN THE HUMPHRIES CASE.

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

With Referee Mortimer Stone

Award 18 720
Docket 34 752

Parties to Dispute: Louisville and Nashville Railroad Company; Brotherhood of Locomotive Firemen and Enginemen

Statement of Claim: "Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Art. 31."

Findings: The First Division of the National Railroad Adjustment Board; upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claimant was dismissed from service on charge of assaulting two employes on duty on February 15, 1956. The first of those employes, although he had called the police and so reported immediately after the incident, denied at the investigation any assault on him beyond horseplay. The second testified supporting the charge of assault on him and this was met by denial by claimant. Apparently the only disinterested witness was Hostler Maddox, who was not available, and claimant's General Chairman requested delay of the investigation until he could be present. Notwithstanding, the investigation was set for February 28 on which date all other witnesses were heard.

Thereupon the General Chairman stated in the record that he wanted no action taken due to the fact that the only eye witness was not there and could not be located; that the Assistant Superintendent had requested that the investigation be held on the 28th, for personal reasons, and "I stated that we would have to hold the investigation and in the meantime we would try to locate Mr. Maddox. . .". Maddox returned and reported for duty on March 16 but his statement was not taken and on March 31st claimant was given notice of his discharge. The applicable rule required that such notice be given within ten days after the close of the investigation but an appended note thereto read: "It is understood that the investigation will not be considered as closed until the papers have been approved by the management". Carrier asserts that the papers were not approved until March 30. If the investigation was closed when the statements were signed and witnessed on February 28, claimant was not given notice in apt time; if it was not closed until March 30 carrier was obligated to take the statement of Maddox which it failed to do.

Award: Claim sustained with pay for time lost as the rule is construed on the property.

National Railroad Adjustment Board,
By Order of First Division,
Attest: (s) J. M. MacLeed,
Executive Secretary.

Dated at Chicago, Illinois,
this 14th day of May 1958.

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

With Referee Mortimer Stone

Interpretation
Award 18 720
Docket 34 752

Parties to Dispute } Louisville and Nashville Railroad Company Brotherhood of Locomotive Firemen and Enginemen

INTERPRETATION

The above numbered award sustained a claim for reinstatement of claimant to service with pay for time lost as the rule is construed on the property.

In its request for interpretation carrier asserts that a dispute exists between the parties as to the proper application of the award in that carrier asserts and the organization denies that outside earnings during the period held out of services should be deducted in computing pay for time lost.

Wherefore carrier seeks to have the Division determine that dispute as an interpretation of its award.

Facts and supporting data as to that issue were not included in the docket on which Award 18 720 was predicated, the issue here raised was not submitted to the Division for determination, and we may not now determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17 500 and "Interpretation" thereof.

National Railroad Adjustment Board
By Order of First Division
Attest: (s) J. M. MacLeed
Executive Secretary

Dated at Chicago, Illinois,
This 17th day of December 1958.

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

With Referee Carroll R. Daugherty

Award 19 363
Docket 36 463

Parties to Dispute } Louisville and Nashville Railroad Company Brotherhood of Locomotive Firemen and Enginemen

Statement of Claim: "Claim of Fireman B. G. Humphries for the wages he lost as fireman from March 31, 1956 to May 29, 1958 without deduction of wages he earned in outside employment during that period of time."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Fireman B. G. Humphries was dismissed from the service of petitioning-carrier on March 31, 1956. The propriety of the carrier's action was challenged by the Brotherhood of Locomotive Firemen and Enginemen who instituted claim on behalf of Fireman Humphries for reinstatement to service with former seniority unimparied and monetary relief for payment of all time lost, and "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" through the grievance-step procedure to a conclusion on the property. At that juncture, the carrier by ex parte submission submitted the dispute to this First Division and petitioned this

Division to place its stamp of approval upon the dismissal of claimant fireman involved. On May 14, 1958, this Division, in rendering Award 18720 on Docket 34752, held adversely on the carrier's petition and sustained the claim of Fireman Humphries to "be reinstated to service with former seniority unimpaired and paid for all time lost" in the language "with pay for time lost as the rule is construed on the property," and so ordered petitioning carrier. Upon receipt of copy of Award 18720 and this Division's accompanying order, General Chairman Paschall wrote Mr. W. S. Scholl, Director of Personnel, stating that "it is assumed that you will comply with this order promptly and not later than the time specified in the order." On May 17, 1958, Mr. Scholl wrote Mr. Paschall, acknowledging receipt, advising that "instructions are being issued today to cover Fireman Humphries' restoration to the service" and also that "a prompt check will also be made to determine his loss of wages during the period of his dismissal, and Mr. Humphries will be asked to furnish a statement of his earnings in outside employment during that same period." On May 20, 1958, Mr. Paschall replied to Mr. Scholl advising that "earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule and no other construction could be placed upon the rule as well as the Award of the Board."

Under date of September 23, 1958, the carrier, proceeding under Section 3, First (m), of the amended Railway Labor Act, again submitted an ex parte petition to this Division requesting an interpretation of Award 18720 to permit "deduction of outside earnings in determining the amount of time lost due Fireman B. G. Humphries" under Award 18720. By formal Interpretation of Award 18720 on De-

cember 17, 1958, this Division declined to act favorably upon the carrier's ex parte petition, holding (in part):

> ". . . the issue here raised was not submitted to the Division for determination, and we may not now determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17 500 and 'Interpretation' thereof."

Comes now the carrier (by ex parte submission dated January 23, 1959), on the premise of a new case, petitioning that "this Board should so hold by ordering outside earnings, if any, deducted from the amount due Fireman Humphries under Award 18 720." Carrier and its representative here argue that the Division now has the new case and contend that the record shows that carrier has in the past adhered to the deduction principle. The respondent employes contend that (1) the instant "case" has no lawful standing before the Division and must be dismissed on the split-cause and **res judicata** rules, and (2) in any event the no-deduction principle has prevailed on the property.

Award 18 720, involving Fireman Humphries' claim for reinstatement to service and pay for all time lost, was based upon the record in Docket 34 752, as required by Circular No. 1 of the National Railroad Adjustment Board and Circular B of this First Division. The submission in Docket 34 752 did not present and argue the question (deduction or no deduction) regarding the proper interpretation of Rule 31 (f) of the firemen's agreement, although the question could have been included in that submission because such question (if extant) is inherent in Humphries' claim for reinstatement. The First Division subsequently declined a request by petitioning carrier that it interpret Award 18 720 for the purpose of determining whether out-

side earnings should be deducted from the pay due to Humphries, simply because the schedule rule in its application on this subject was not considered by this Division in Award 18720. Accordingly, this Division may not now, pursuant to a new submission, interpret the schedule rule in its application on this subject, because to do so would clearly violate the rule of this Division against permitting the piece-meal submission of disputes. The matter must be judged **res judicata.** The petitioning carrier had the opportunity of submitting the dispute involving Humphries' claim to reinstatement in all of its aspects, and its present attempted submission of one phase of that dispute must accordingly be dismissed.

Award: Case dismissed.

National Railroad Adjustment Board
By Order of First Division
Attest: (s) J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois,
This 9th day of December 1959.